No. 12193

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT A. HOWARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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HERBERT A. HOWARD,

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vs.

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Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings and Facts Disclosing Basis of Jurisdiction.

This action was instituted in the United States District Court in and for the Southern District of California, Central Division, entitled United States of America, Plaintiff, v. Herbert A. Howard, Defendant, No. 21187-CD, by way of indictment charging appellant in twenty-four counts, with various crimes against the United States. [Tr. p. 2.] Trial was by jury and appellant was acquitted of all except two counts of the indictment, namely, Counts Nos. 22 and 24.

Count No. 22 charges appellant with violation of U. S. C. Title 12, Sec. 1467, and Count No. 24 charges appellant with violation of U. S. C., Title 18, Sec. 1006.

Judgment and Commitment was signed by Harry C. Westover, United States District Judge, and filed November 17, 1950. [Tr. pp. 95-96.]

Notice of Appeal was filed on behalf of appellant by his attorneys, November 20, 1950 [Tr. p. 97], wherein he appeals to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment and from the denial of defendant's motion to dismiss the indictment and for judgment of acquittal, or in the alternative, for a new trial.

The statutory basis for jurisdiction of the District Court is U. S. C., Title 18, Sec. 3231, and the statutory basis for the jurisdiction of this Court is U. S. C., Title 28, Secs. 1291 and 1294.

Statement of the Case Relating to Count 22.

On June 30, 1947, appellant, Herbert A. Howard, was president of the Broadway Federal Savings and Loan Association of Los Angeles, California, which was an organization enacted under the laws of the United States and in possession of a charter issued pursuant to the Home Owners' Loan Act of 1933. [Tr. p. 39.]

Count 22 of the Indictment charges appellant with the violation of the United States Code, Title 12, Section 1467 and alleges that "On or about June 30, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HERBERT A. HOWARD, being an officer and employee, namely: president of said association, with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: the regular monthly report for the month ending June 30, 1947, said

entry being reflected in said report in the left-hand column under the caption "ASSETS AND CURRENT EXPENSE" as follows: "1. First mortgage loans: a. Direct reduction loans," and is in the amount of "$339,752.48, which said sum is over-stated in the sum of $8500.00." [Tr. p. 13.]

The report involved, which is the subject of Count 22, was first marked Government's Exhibit 22-X for identification and then admitted into evidence as Government's Exhibit 22-X, over the objection that it was incompetent, irrelevant and immaterial. [Tr. p. 345, line 14, to p. 346, line 4.]

Government's Exhibit 22-X was produced by witness Frank C. Noon who testified that he was the manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board and that he had been connected with the Home Loan Bank for eighteen years. [Tr. p. 210.] He further testified that in his capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations and among such reports were monthly reports. Mr. Noon then produced a monthly report of the Broadway Federal Savings and Loan Association of Los Angeles, California, for June 30, 1947, which is Government's Exhibit 22-X. Mrs. Mildred P. Wilson, who was the assistant secretary of the Broadway Federal Savings and Loan Association on June 30, 1947, testified that appellant read and approved Government's Exhibit 22-X and then gave it to her to send to the Home Loan *Bank*, and that is where the witness sent the Exhibit. [Tr. p. 278, lines 10 to 16.] This in substance is the testimony and evi-

dence relating to appellant's communication of a report to a federal agency.

The testimony and evidence relating to the falsity of the entry are not stated here, as appellant is making no point with respect to the sufficiency of the evidence to show falsity of an entry in the report.

With respect to appellant's intent in causing the monthly report of June 30, 1947, to be made, showing an overstatement of loans, Mrs. Mildred P. Wilson testified that appellant told her he was going to set up collateral loans on certificates held by certain persons in the Broadway Federal Savings and Loan Association and that after the report had been sent to the Home Loan *Bank,* these loans would be cancelled. [Tr. pp. 283 and 342.]

The substance of the testimony and evidence of the Government on appellant's intent, as stated herein, also raises the question of the sufficiency of the evidence to sustain appellant's conviction.

The insufficiency of the evidence is directed particularly to the issues of (1) The making or transmission of a report to the Federal Home Loan Bank *Board,* and (2) the intent of appellant to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, its auditors and examiners. The question of the sufficiency of the evidence to sustain a conviction on Count 22 was raised below by appellant's motion for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of the entire case.

Specification of Errors Relied Upon by Appellant Concerning Count 22.

1. The Court erred in denying appellant's motion for a judgment of acquittal in that the evidence is not sufficient to sustain a conviction on Count 22 of the Indictment because the evidence fails to prove: (a) That Government's Exhibit 22-X was transmitted or made to the Federal Home Loan Bank *Board;* (b) That there was any intent of appellant to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank *Board,* its auditors and examiners and (c) That there was any Federal Home Loan Bank *Board* in existence on June 30, 1947.

2. The Court erred in admitting evidence during the trial over the objection of appellant in that the Court admitted in evidence Government's Exhibit 22-X after objection had been made that it was immaterial, incompetent and irrelevant. [Tr. p. 345.]

ARGUMENT ON COUNT NO. 22.

I

The Court Erred in Denying Appellant's Motion for a Judgment of Acquittal in That the Evidence Is Not Sufficient to Sustain a Conviction on Count 22 of the Indictment Because the Evidence Fails to Prove: (a) That Government's Exhibit 22-X Was Transmitted or Made to the Federal Home Loan Bank Board; (b) That There Was Any Intent of Appellant to Deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, Its Auditors and Examiners and (c) That There Was Any Federal Home Loan Bank Board in Existence on June 30, 1947.

A. *The Indictment and Instructions.* Count 22 charges the appellant with a violation of Section 1467(c) of Title 12 of the United States Code and it is alleged in Count 22 that appellant "did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: the regular monthly report for the month ending June 30, 1947." [Tr. pp. 13 and 14.] The Court instructed the jury in accordance with the allegations contained in the Indictment. Specifically, the Court instructed the jury in accordance with the Government's requested instructions that one of the elements of the offense charged in Count 22 was that "defendant did make or cause to be made false entry in a report to the Federal Home Loan Bank Board, namely, a monthly report for the month ending June 30, 1947, which report was false in that direct reduction loans were overstated in the amount of $8500.00." [Tr. p. 454, lines 16 to 20.] In accordance with the allegations of Count 22 and the Court's instructions, the jury's verdict of guilty consti-

tuted a finding by the jury that the report involved in Count 22 was made to the Federal Home Loan Bank *Board.* The making and transmission of the monthly report of June 30, 1947, to the Federal Home Loan Bank *Board* being an essential ingredient of the offense charged in Count 22 of the Indictment, the jury's verdict of guilty can stand only if the evidence is sufficient to support a conclusion beyond a reasonable doubt that the monthly report involved was transmitted to the Federal Home Loan Bank *Board.*

A second essential ingredient of the offense contained in Count 22 and the Court's instructions thereon is that appellant, in making said report to the Federal Home Loan Bank Board, did so "with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners." [Tr. pp. 13 and 454.]

B. *The evidence relating to Count 22.* The only testimony in the record from any employee of the Broadway Federal Savings and Loan Association relative to the transmission of the monthly report was that of Mildred P. Wilson, the assistant secretary at the date of this report on June 30, 1947. The report which is the subject of Count 22 was first marked Government's Exhibit 22-X for identification and admitted into evidence as Government's Exhibit 22-X. [Rep. Tr. p. 345.] The testimony of Mrs. Mildred Wilson relating to the making and transmission of Government's Exhibit 22-X to any Federal Agency is found in the Transcript of Record, page 278, lines 9 to 16. This testimony is as follows:

"By Mr. Danielson:

Q. Do you remember what you did with that report after it was completed? A. After the report

was completed then it always had to go to Mr. Howard's desk, then, after he read it and approved it, then he gave it to me to send down to the *Home Loan Bank,* and that was what was done." (Emphasis added.)

The only other testimony in the record which pertains to the making and transmission of Government's Exhibit 22-X to any Federal Agency is that of Frank C. Noon, a Government witness. The testimony of Mr. Noon pertaining to these matters is contained in the Transcript of Record beginning on page 240, line 7, and going to page 241, line 22, then again on page 245, lines 5 to 18. This testimony of Frank C. Noon is as follows:

FRANK C. NOON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

"The Clerk: That is spelled N-o-o-n?

The Witness: That is right.

Direct Examination

By Mr. Danielson:

Q. Where do you live, Mr. Noon? A. 5542 Carlton Way, Los Angeles.

Q. What is your work? A. I am manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board.

Q. How long have you been connected with the Home Loan Bank? A. Eighteen years.

Q. For the sake of clarity, is there any connection between the Home Owners Loan Corporation and the Federal Home Loan Bank Board? A. No, ex-

cept they are under the same supervision in Washington. No other connection.

Q. But it is supervised by the same person? A. By the same board in Washington.

Q. In your present capacity with the Federal Home Loan *Bank,* do you receive reports from various Federal Savings and Loan Associations? (Emphasis added.) A. Yes.

Q. Among them do you receive monthly reports? A. Yes.

Q. And are such reports a part of the official records of your office. A. They are.

Q. Do you have with you a monthly report of the Broadway Federal Savings and Loan Association of Los Angeles, California, for June 30, 1947? A. I do.

Q. Will you present it, please?

(The document referred to was passed to counsel.)

Mr. Rose: May we approach the bench?

The Court: Yes.

Mr. Danielson: May I see it, counsel?

(The document referred to was passed to counsel.)

By Mr. Danielson:

Q. Is that a part of the records that are regularly maintained by your office in the course of its business as an arm of the government?

Mr. Rose: That is objected to as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: This particular sheet was the one sent to Washington and forwarded to me by the chief supervisor in response to the subpoena.

Mr. Rose: I ask that that answer be stricken as being hearsay evidence and improper.

The Court: The last part of it may go out."

With respect to the issue of appellant's intent, the Government's evidence is again the testimony of Mrs. Mildred P. Wilson. In substance Mrs. Wilson testified that in a conversation with appellant, appellant stated that they would set up these collateral loans to show on the monthly report and that after this report had been sent to the Home Loan Bank the loans would be cancelled. [Tr. pp. 283 and 342.]

C. *The insufficiency of the evidence.* The rule seems to be well-settled that in passing upon a motion for a judgment of acquittal the Court must determine whether upon the evidence a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If the Court concludes that upon the evidence there must be such a doubt in a reasonable mind, the motion for judgment of acquittal must be granted. To state the rule another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion for judgment of acquittal must be granted. (See *Curley v. United States,* 160 F. 2d 29; *United States v. Cole,* 90 Fed. Supp. 147, and *United States v. Maryland and Virginia Milk Producers' Association,* 90 Fed. Supp. 681.)

(1) *The insufficiency of the evidence to establish that appellant made a report to the Federal Home Loan Bank Board.* Appellant submits that there is not a scintilla of evidence that Government's Exhibit 22-X was transmitted to, or filed with, the Federal Home Loan Bank *Board,* and hence appellant is entitled to an acquittal on Count 22.

The government's evidence merely shows that appellant caused Government's Exhibit 22-X to be sent from the Broadway Federal Savings and Loan Association to the Federal Home Loan *Bank,* which is not a crime under Title 12, Section 1467 of the United States Code, which is the statute forming the basis for Count 22. Mrs. Mildred P. Wilson's testimony, as indicated above, was that appellant gave her Government's Exhibit 22-X " to send down to the Home Loan *Bank* and that was what was done." [Tr. p. 278, lines 12 to 15.] (Emphasis added.)

Mrs. Mildred P. Wilson's testimony was corroborated by that of Mr. Frank C. Noon who produced Government's Exhibit 22-X in his "capacity with the Federal Home Loan *Bank.*" (Emphasis added.) Although Mr. Noon testified that he was a "supervisory agent of the Federal Home Loan Bank Board" as well as manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco, there is no testimony by Mr. Noon that Government's Exhibit 22-X came from the files of the Federal Home Loan Bank *Board.* Mr. Noon's testimony was very specific. Mr. Noon was asked by the government prosecutor whether in his present capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations and whether monthly reports were among them and whether such reports were part of the official reports of his office and whether he had with him a report of the Broadway Federal Savings and Loan Association for June 30, 1947. Mr. Noon replied yes to these questions and then produced Government's Exhibit 22-X. [Tr. p. 241.] Upon being asked whether Government's Exhibit 22-X was a part of the records that are regularly maintained by his office in the course of its business as an arm of the government,

Mr. Noon testified that "this particular sheet was the one sent to Washington." The balance of Mr. Noon's answer was stricken by the Court. [Tr. p. 245, lines 5 to 18.]

There is thus no testimony whatever to establish that appellant caused Government's Exhibit 22-X to be sent to, or filed with, the Federal Home Loan Bank *Board.*

As a matter of fact, the testimony of Mr. Noon that "this particular sheet was sent to Washington" establishes nothing. There is no testimony as to who sent the document to Washington, who authorized the sending or to whom the document was sent in Washington. It would be nothing but sheer speculation and guessing concerning who sent Government's Exhibit 22-X to Washington, who authorized the sending or to whom the said Exhibit was sent. Certainly there is nothing in the testimony of Mr. Noon which permits a reasonable mind to fairly conclude beyond a reasonable doubt that appellant caused Government's Exhibit 22-X to be sent to the Federal Home Loan Bank *Board.* To form any such conclusion, the jury would be required to reject entirely the testimony of the Government's witness, Mildred P. Wilson, and decide the question on pure speculation, without any evidence at all.

The Government's evidence establishes only that Government's Exhibit 22-X was transmitted to the Federal Home Loan *Bank* by Mrs. Mildred P. Wilson at appellant's direction. But this does not establish a crime under Section 1467 of Title 12 of the United States Code under which Count 22 of the Indictment is brought. Section 1467 of Title 12 of the United States Code creates the crime of false entry only if the report contain-

ing a false entry is made to the Federal Home Loan Bank *Board*. The section uses the term "board," but "board" is defined in Section 1462(a) of Title 12 of the United States Code as meaning the Federal Home Loan Bank *Board*. Section 1467(c) of Title 12 of the United States Code, which is the basis of Count 22, does not name the Federal Home Loan *Bank* at all as one of the agencies to whom a false report will constitute a crime.

That the Federal Home Loan *Bank* to which the Government's evidence shows appellant caused Government's Exhibit 22-X to be sent, is an entirely separate and distinct agency from the Federal Home Loan Bank *Board*, to which Count 22 charges appellant sent Government's Exhibit 22-X, is too clear for argument.

Both the Federal Home Loan Bank *Board* and the Federal Home Loan *Banks* were created by the Federal Home Loan Banks Act of 1932, enacted as Title 12, Chapter 11 of the United States Code. The Federal Home Loan Bank *Board* was composed of five (5) citizens appointed by the President of the United States by and with the advice and consent of the Senate. (See Sections 1422 and 1437 of Title 12 of the United States Code.)

On the other hand, the United States is divided into between 8 and 12 districts and a Federal Home Loan *Bank* is established in each district. The management of each Federal Home Loan *Bank* is vested in a board of 12 directors, some of whom are appointed by the Federal Home Loan Bank *Board* and the others are elected by the Savings and Loan Associations which are members of the Federal Home Loan *Bank* in their district. (See Sections 1422, 1423 and 1427 of Title 12 of the United States Code for the pertinent provisions.)

There is thus one Federal Home Loan Bank *Board* but there are between 8 and 12 Federal Home Loan *Banks*. From Mr. Noon's testimony, it appears that the bank for this area is the Federal Home Loan Bank of San Francisco with a Los Angeles Branch. [Tr. p. 240.] Making a report to a Federal Home Loan *Bank* is thus making a report to an entirely different government agency than making a report to the Federal Home Loan Bank *Board*.

Congress has clearly and unequivocally made a distinction between the *Board* and a Home Loan *Bank* in fixing criminal responsibility for filing false reports. Thus, in Section 1441(c) of Title 12 of the United States Code (The Federal Home Loan Bank Act of 1932) it is made a crime for anyone connected in any capacity with the Board or a Federal Home Loan Bank to make a false entry in a report "to the (Federal Home Loan Bank) board or a Federal Home Loan Bank." When congress enacted the Home Owners Loan Act of 1933, a year later, it created the crime of false entry in a report to the Federal Home Loan Bank *Board* in Section 1467(c) of Title 12 of the United States Code, which is involved here, but omitted any reference to a report to a Federal Home Loan *Bank*. By including a Federal Home Loan *Bank* in Section 1441(c) of Title 12 of the United States Code along with the Federal Home Loan Bank *Board* but not including a Federal Home Loan *Bank* along with the Federal Home Loan Bank *Board* in Section 1467(c) of Title 12 of the United States Code, which latter section is involved here, Congress indicated a clear legislative intent in the latter statute to confine the crime of false entry to reports in the Federal Home Loan Bank *Board*.

The foregoing clearly and unequivocally establishes that the evidence fails utterly to prove that Government's Exhibit 22-X was filed with the Federal Home Loan Bank Board and hence an essential element of the crime under Count 22 is unproved. Proof that the Government's Exhibit 22-X was filed with a Federal Home Loan *Bank* establishes no crime under Section 1467(c) of Title 12 of the United States Code. An essential element of the crime charged in Count 22 being lacking in proof, there is no evidence in this record upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt and appellant is thus entitled to have his motion for judgment of acquittal on Count 22 granted.

The government's proof would have been insufficient to sustain a conviction under Count 22 even if Mr. Noon's testimony had been that he was producing Government's Exhibit 22-X from the files of the Federal Home Loan Bank *Board*. This would be true because one essential element of the crime is that *appellant must make the report to* the Federal Home Loan Bank *Board*. The mere drawing up or assembling of a report which contains a false entry does not establish a crime under Section 1467(c) of Title 12 of the United States Code. It is only *communication* of the false statement by the defendant to the agency named in the statute which constitutes a crime. In the case at bar the government's proof, through the testimony of Mrs. Mildred P. Wilson, establishes only that appellant communicated the false statement contained in Government's Exhibit 22-X to *one agency only*, namely, the Federal Home Loan *Bank*. If that agency decided to send the report to another agency, namely, the Federal Home Loan Bank Board, there would still be lacking proof to establish that appel-

lant caused the report to be forwarded to the second agency.

That communication of the false statement by a defendant to the agency named in the statute constitutes the essence of the crime of false entry is established by *Reas v. United States,* 99 F. 2d 752 (C. C. A. 4th). The *Reas* case was a prosecution under Section 1441(a) of Title 12 of the United States Code. The Court stated the rule of law in this convincing fashion:

> ". . . Communication of the false statement to the Corporation constitutes the very essence of the crime. It is in this sense that the statute condemns the making of a false statement for the purpose of influencing the bank. The mere assembling of the material and its arrangement in a written composition containing the misrepresentation of facts can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. . . ." (*Reas v. United States,* 99 F. 2d 752, 755 (C. C. A. 4th).)

(2) The Evidence Is Insufficient to Establish Any Intent to Deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, Its Auditors and Examiners.

Count 22 is derived from Section 1467(c) of Title 12 of the United States Code, and the instructions given by the Court required a finding by the jury that appellant made a false report to the Federal Home Loan Bank Board with intent to deceive the Home Owners' Loan

Corporation and the Federal Home Loan Bank Board, its auditors and examiners. [See p. 434 of the Transcript of Record for the Instructions.] The record is barren of any testimony that appellant intended to deceive the Home Owners' Loan Corporation. There is no evidence that appellant knew anything about the Home Owners' Loan Corporation or expected such corporation to receive Government's Exhibit 22-X or act upon it. This is likewise true with respect to the matter of intent to deceive the Federal Home Loan Bank Board, its auditors and examiners.

The Government's evidence at best establishes no more than that appellant intended to deceive the Federal Home Loan *Bank*. The evidence was specific on this point. Mrs. Mildred P. Wilson, a witness for the government, testified twice in response to questions, that, in her conversations with appellant with respect to setting up the false entry in Government's Exhibit 22-X, appellant told her that the report was for the Home Loan *Bank* and that after the report was made to the Home Loan *Bank,* the loans which were the false entries would be cancelled. [Tr. pp. 283 and 342.] In the face of Mrs. Wilson's testimony there is lacking any evidence to establish that appellant had any intent to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank *Board,* its auditors and examiners. This essential element of the crime charged in Count 22 being lacking in proof, appellant's motion for judgment of acquittal on Count 22 should have been granted.

(3) No Crime Under Section 1467(c) of Title 12 of the United States Code, as Alleged in Count 22 of the Indictment, Could Have Been Committed by Appellant on or About June 30, 1947, as the Federal Home Loan Bank Board Was Not in Existence at Such Time.

Reference is made to *Executive Order No. 9070*, effective date February 24, 1942 (*Title 50, United States Code,* App. Sec. 601, First War Powers Act) which states in part as follows:

> "1. The following agencies, functions, duties and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator: . . .
>
> (b) All functions, powers and duties of the Federal Home Loan Bank Board and of its members."

Section 8 of the same Executive Order reads in part as follows:

> "The following personnel are not transferred hereunder: . . .
>
> (2) the members of the Federal Home Loan Bank Board other than the Chairman . . . The offices of the foregoing personnel excepted from transfer by this paragraph are hereby vacated for the duration of this order: Provided, That the offices of the members of the Federal Home Loan Bank Board shall not be vacated until sixty days from the date of this order."

The appellant is charged in Count No. 22 of the Indictment with having committed the crime of false entry by making and causing to be made a false entry in a report to the Federal Home Loan Bank Board *on or about June 30, 1947*. It is respectfully submitted that in view of the above Executive Order, no Federal Home Loan Bank Board was then in existence, and for that reason, no crime could be committed in a report to a defunct agency.

On July 27, 1947, practically a month after the alleged crime was committed by the appellant, reorganization Plan No. 3 of 1947 became effective (Title 5 of the United States Code, Sec. 133Y-16) which set up a housing and home financing agency. As part of said agency, Section 1 provides as follows:

> "There shall be in said Agency constituent agencies which shall be known as the *Home Loan Bank Board,* the Federal Housing Administration, and the Public Housing Administration." (Emphasis supplied.)

Section 2 of the same Plan states as follows:

> "Sec. 2. Home Loan Bank Board. (a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate . . ."

Section 2 of the reorganization Plan No. 3 of 1947 hereinabove cited then continues to state further the exact functions of the new "Home Loan Bank Board" which as far as organization is concerned, as well as far as powers and duties are concerned, are entirely different and distinct from the *Federal* Home Loan Bank Board in existence prior to 1942.

It is, therefore, respectfully submitted that on the date of the alleged offense in Count No. 22 of the Indictment, namely, June 30, 1947, no Federal Home Loan Bank Board was then in existence, and the Court's attention is further invited to the fact that the Federal Home Loan Bank Board was never reorganized but a new agency was created in the reorganization Plan No. 3 of 1947, effective July 27, 1947.

II.

The Court Erred in Admitting Evidence During the Trial Over the Objection of Appellant in That the Court Admitted in Evidence Government's Exhibit 22-X After Objection Had Been Made That It Was Immaterial, Incompetent and Irrelevant.

The Government's evidence relating to Government's Exhibit 22-X has been discussed under Point I, *supra.* This evidence established merely that appellant caused the report, identified as Government's Exhibit 22-X, to be sent to the Federal Home Loan Bank. The making of a false report to a Federal Home Loan Bank is not a crime under Section 1467(c) of Title 12 of the United States Code, nor was appellant charged with making such a report to a *Bank* in Count 22.

Government's Exhibit 22-X, therefore, had no relevancy and did not tend to establish appellant's guilt as charged in Count 22, and the trial court erred in admitting the Exhibit in evidence over the appropriate objection of appellant that it was incompetent, irrelevant and immaterial. [Tr. p. 345.]

Statement of the Case Relating to Count No. 24.

On March 22, 1949, appellant Herbert A. Howard was the President of Broadway Federal Savings and Loan Association of Los Angeles, which was an organization acting under the laws of the United States and in possession of a charter issued pursuant to the Home Owners Loan Act of 1933. [Tr. p. 39.] Count No. 24 of the indictment charges appellant with violation of United States Code, Title 18, Section 1006, and particularly, that on March 22, 1949, appellant, as President of the Broadway Federal Savings and Loan Association of Los Angeles,

> "with intent to deceive Home Owners Loan Corporation and Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made, a false entry in a report to the Federal Home Loan Bank Board, namely, an affidavit of the president of said association, attached to the report of examination of said association as at the close of business March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association's books are in full force and effect and that the signatures appearing thereon are genuine, whereas in truth and in fact, there was recorded on the records of said association the following notes bearing the signature of one . . . Vashti Peake, Loan No. 274—Vashti Peake, and said signatures were false and forged as the defendant then and there knew." [Tr. p. 15.]

Frank C. Noon, a government witness, testified that he is the manager of the Los Angeles branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board and

that he had been connected with the Home Loan Bank for eighteen years. [Tr. p. 240.] He further testified that in his capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations. [Tr. p. 241.] Mr. Noon further testified as follows:

"Q. Mr. Noon, do you have in your possession report of the Federal Savings and Loan Association's examiner pertaining to the Broadway Federal Savings and Loan Association dated on or about March 22, 1949? A. I have a certificate of the examiner in charge and the affidavit of the president or secretary on the same sheet.

Q. For the same date, March 22, 1949? A. The affidavit is March 22, 1949.

Q. Will you produce it, please? A. (Producing document referred to.)

Mr. Danielson: I ask that this document be marked Government's exhibit next in order under Count 24, your Honor.

The Court: It may be received.

The Clerk: 24-B for identification?

The Court: No, it may be received in evidence.

Mr. Jefferson: I object to it, that there is an insufficient foundation laid for it, no relevancy at all has been shown relative to the document now being offered.

The Court: Overruled.

Mr. Rose: And it does not appear that this is a part of the Home Loan Bank Board's report. It appears to be just one sheet.

The Court: Overruled.

The Clerk: 24-B in evidence, your Honor?

The Court: 24-B in evidence.

(The document referred to was marked Government's Exhibit No. 24-B and received in evidence.)

Mr. Danielson: And is that certificate part of the official records of your office?

The Witness: It is.

Mr. Danielson: No further questions from this witness on direct examination, your Honor." [Tr. p. 254, line 17, to p. 255, line 23.]

Exhibit 24-B is marked as page "17" at the bottom of said exhibit. On cross-examination, Mr. Noon testified:

"Q. By Mr. Rose: You don't know under what circumstances you received that last page over there, of your own knowledge, do you? A. Yes.

Q. Who handed that last page to you? A. I wrote to the Chief Supervisor in Washington in response to a subpoena and asked him to send it to me, and I received it in the mail.

Q. I know. Maybe my question wasn't clear. *You don't know how that last page came into the hands of any government branch, do you?* A. *No.*

Q. *You don't know under what circumstances that signature of Mr. Howard, if it is Mr. Howard's signature, came to be on that piece of paper?* A. *No, I have no personal knowledge of it.*" [Tr. p. 268, line 26, to p. 269, line 15.]

Appellant testified concerning the same exhibit as follows:

"Q. By Mr. Jefferson: I now direct your attention, Mr. Howard, to Government's Exhibit 24-B, and ask you to examine that document? A. Yes, sir, it is my signature.

Q. Will you state the circumstances under which you put your signature on that document? A. I saw this paper was laying on my desk, and Mr. Manley in going out to lunch—that is the bank examiner—asked me, said 'Mr. Howard, at your convenient time, I would like for you to sign some papers I place on your desk.' On the following day, I signed this instrument.

The Court: May I ask a question?

Mr. Jefferson: Yes, your Honor.

The Court: I understand from the testimony that has been produced, and also from the memorandum itself, that that was page 17 of a report. Now, when you say the papers were on your desk, do you mean just that sheet or the entire report?

The Witness: Just this sheet.

The Court: Just this sheet?

The Witness: Yes, and another—there was two other short forms.

The Court: But the other 17 sheets of that report were not with the affidavit?

The Witness: No, your Honor.

Q. By Mr. Jefferson: What was the date that this Mr. Manley was in the Broadway making an examination and handed you this sheet? A. I think it is sometime in March or April.

Q. When you signed this, you say you signed it the next day, what did you do with it after you signed it? A. I left in on my desk that evening.

Q. Do you know who picked the sheet up? A. I don't know. I couldn't recall.

Q. When did you next see the sheet again after seeing it on your desk? A. I think today, this is the first time." [Tr. p. 403, line 10, to p. 404, line 19.]

On April 12, 1948, one Vassar Lee Burks made an application for a loan of $30,000.00 with the Broadway Federal Savings and Loan Association of Los Angeles, on property located at 625 East 49th Street, Los Angeles, California. [Deft. Ex. MMMM 24.] After the loan was set up on the books of the association, Mrs. Burks cancelled the transaction in escrow and her deposit was refunded to her. At the time of this cancellation, three sisters were working either for the Broadway Federal Savings and Loan Association of Los Angeles, or for Mr. Herbert A. Howard. Vashti Peake, now known as Vashti Cottman, was working in the real estate office of appellant, an office distinct and separate from the association. Alma Moore, the second sister and Mildred P. Wilson, the third sister, were both employed in the office of the Broadway Federal Savings and Loan Association of Los Angeles. After Mrs. Burks had cancelled the escrow and the loan, Mildred P. Wilson and Alma Moore, the two sisters employed by the Broadway Federal Savings and Loan Association of Los Angeles, decided that they would like to take over the property and carry it in the name of their sister Miss Vashti Peake for the reason that both were married and Alma Moore was contemplating a divorce from her husband. [Tr. p. 398, line 26, to p. 399, line 4; p. 401, lines 17-23.]

On August 2, 1948, Vashti Peake signed an application for a loan in the amount of $22,500.00 payable in installments of $200.00 per month. [Deft. Ex. E.] Vashti Peake testified that the signature on the application for the loan was her signature. The property was appraised and inspected and the loan approved by appraisers G. W. McKinney, H. C. Hudson, and M. Earle Grant. [Deft. Ex. E.]

Vashti Peake further testified that the signature on a note for $21,500.00 and a deed of trust securing said note, dated September 1, 1948, were not her signatures. [Govt. Ex. 24-A.]

Vashti Peake further testified that the signature on the original as well as on the duplicate "Notice of Completion" [Deft. Exs. F and G], were her signatures. Her sister Mildred P. Wilson testified concerning the note and trust deed [Deft. Ex. 24-a] that the signatures on said note and trust deed were those of the other sister, Alma P. Moore, and that *Mrs. Wilson notarized the signature on the deed of trust knowing that Alma Moore had signed the third sister's name.* Specifically concerning the acknowledgment of the signature of Vashti Peake on the deed of trust, Mrs. Wilson testified as follows:

> "Q. By Mr. Rose: Do you know who signed the name of Vashti Peake above your acknowledgment?
>
> Mr. Danielson: I object to that question on the same ground. It pertains to Count 24. It is beyond the scope of the direct and improper cross.
>
> The Court: Overruled.
>
> The Witness: State your question again, please.
>
> Mr. Rose: Will you read the question?
>
> (The last question was read by the reporter.)
>
> The Witness: Yes, I do.
>
> Q. By Mr. Rose: Who was it? A. Alma P. Moore.
>
> Q. Your sister? A. Yes, my sister.
>
> Q. Vashti Peake is also your sister? A. That is correct.
>
> Q. You notarized the signature, knowing that Alma P. Moore had signed your sister's name? A. That is correct.

Q. And that is your signature? A. Yes, that is my signature." [Tr. p. 337, lines 6-26.]

Mrs. Wilson testified further concerning this acknowledgment as follows:

"Q. (By Mr. Danielson): What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize this signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn't sign that.

Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association." [Tr. p. 339, line 22, to p. 340, line 2.]

During the month of September or October, 1948, the sisters decided not to go through with the transaction. At that time construction had started on the building and was then in progress. Appellant took over the property including the loan and furnished additional moneys to complete construction of the building. [Tr. p. 406, line 16, to p. 408, line 7.]

He paid the difference between $33,000.00, the total cost of the building, and the loan of $21,500.00, out of his own pocket.

On July 5, 1949, Appellant paid off the entire loan, in cash, in the amount of $20,746.92. [Deft. Ex. NNNN 24; Tr. p. 408, lines 12-22.] He resold the property to Olivia Daniels, a real estate broker in his office. This sale is evidenced by escrow instructions [Deft. Ex. J (5)-24] dated September 2, 1949. The purchase by Olivia Daniels of Appellant's property as evidenced by the escrow instructions, was in part facilitated by way of a $25,000.00 loan dated August 6, 1949 and evidenced by Government's

Exhibit 24-C, including a check to Appellant in the amount of $24,849.50, dated September 12, 1949.

During 1949, Appellant discharged Alma Moore from her position at the Broadway Federal Savings and Loan Association of Los Angeles, on the ground of repeated drunkenness. Shortly thereafter Appellant discharged Mildred P. Wilson as an employee of the Broadway Federal Savings and Loan Association of Los Angeles on the ground of non-cooperation with other employees of the Association. Shortly after the discharge of the two sisters, Vashti Peake resigned from her position in the real estate office of Appellant.

Government's Exhibit 24-B entitled Certificate of Examiner in Charge and Affidavit of President or Secretary, dated March 22, 1949, shows that the signature of Herbert A. Howard as President was purportedly subscribed and sworn to on the 22nd day of March, 1949, before Orville M. Manley, Examiner. Mr. Manley was not called by the government and did not testify. The only evidence of delivery or non-delivery of this document contained in the record of this case, is the testimony of H. A. Howard that said document was not subscribed and sworn to before the examiner nor was it delivered to the examiner nor did he authorize its delivery to any person whomsoever.

Specification of Errors Relied Upon by Appellant Concerning Count No. 24.

1. The indictment fails to allege facts sufficient to constitute an offense against the United States in that Count 24 of the indictment charges the making of a false entry in the report to the Federal Home Loan Bank Board, but such entry is not a Federal crime under Section 1006 of Title 18 of the United States Code, and no Federal Home Loan Bank Board was then in existence.

2. The Court erred in admitting evidence during the trial over the objection by Defendant in that the Court admitted in evidence Government's Exhibit 24-B, the purported affidavit of president H. A. Howard, without any foundation having been laid for its admissibility.

3. The Court erred in failing to give certain requested instructions to the jury and particularly defendant's instruction No. 3 [Tr. p. 66] and defendant's instruction No. 62. [Tr. p. 72, line 22, to p. 73, line 8; excepted to at Tr. p. 489, lines 6-12.]

4. The Court erred in giving certain instructions to the jury to which Appellant duly excepted, as follows: (a) The Court's instructions reported at page 465, lines 17 to 22, and page 459, lines 12 to 19, excepted to at page 486, lines 8 to 18, of Reporter's Transcript, and (b) the Court's instruction reported at page 459, lines 20 to 26, excepted to at page 485, lines 12 to 23, Reporter's Transcript.

5. The Court erred in denying defendant's motion to dismiss the indictment and for judgment of acquittal on the following grounds: that the evidence is not sufficient to sustain a conviction on count 24 of the indictment in that there is a complete lack of evidence in the record in this case to establish: (a) that defendant H. A. Howard, or any other person, made a report to the Federal Home Loan Bank Board on or about March 22, 1949, (b) that there is in existence any report of examination of the Broadway Federal Savings and Loan Association of Los Angeles as at the close of business March 8, 1949, (c) any intent to defraud or deceive the Federal Home Loan Bank Board, (d) that there was any Federal Home Loan Bank Board then in existence; (e) that defendant knew or had any reason to know that the signature of Vashti Peake on the promissory note was false or forged.

ARGUMENT ON COUNT NO. 24.

I.

The Indictment Fails to Allege Facts Sufficient to Constitute an Offense Against the United States in That Count 24 of the Indictment Charges the Making of a False Entry in the Report to the Federal Home Loan Bank Board, but Such Entry Is Not a Federal Crime Under Section 1006 of Title 18 of the United States Code, and No Federal Home Loan Bank Board Was Then in Existence.

Section 1006 of Title 18 of the *United States Code* reads in part as follows:

> "Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, with intent to defraud *any such institution* or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of *any such institution or* of department or agency of the United States, makes any false entry in any book, report or statement *of or to any such institution* . . ." is guilty of an offense. (Emphasis added.)

The statute consists of four separate parts and defines:

(1) the person who may be charged with the crime of false entry;

(2) the type of false entry which is punishable;

(3) the persons, individual or corporate, which the wrongdoer may intend to defraud; and

(4) the persons, individual or corporate, which the wrongdoer may intend to deceive.

In the light of the analysis hereinabove set forth, the statute defines (1) the wrongdoer, and (2) the type of report, as follows:

> "Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States. . . . makes any false entry in any book, report or statement of or to *any such institution*," is guilty of an offense.

The persons which the wrongdoer may intend to defraud or deceive are defined as follows:

> ". . . , with intent to defraud *any such institution or* any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of *any such institution or* of department or agency of the United States, . . ."

The term "any institution" appears three times in his statute. The statute defines the false entry as an entry in any book, report or statement of or to *any such institution,* with intent to defraud *any such institution* . . . or to deceive any officer, auditor, examiner or agent of *any such institution* . . .

The type of person or corporation affected by the wrong-doer's intent to defraud is not limited in this statute to "any such institution," but the scope of the statute is broadened by including the intent to defraud any other company, body politic or corporate, or any individual, and the scope of the statute is further broadened by including in the intent to deceive "any officer, auditor, examiner or agent of department or agency of the United States."

In other words, an officer, agent or employee of institution "A" who makes any false entry on any book, report or statement of or to any *such* institution "A," with intent to defraud "A" or "B" or with intent to deceive any officer, auditor, examiner or agent of "A" or "C," is guilty of an offense.

While the scope of the statute was broadened as far as the intent to deceive or defraud is concerned, by making it a criminal offense to make a false entry in a report with intent to deceive *any* department or agency of the United States, the statute was not broadened as to include entries in reports to agencies other than those specifically enumerated in the first part of the statute.

The most obvious reason for such a conclusion is the fact that the statute recites specifically the institutions, in the first part, to which a report is made. Otherwise,

the specific enumeration of the organizations would be meaningless and the statute would in effect read:

> "Whoever, being an officer, agent or employee of or connected in any capacity with any department or agency of the United States makes any false entry in any book, report or statement of or to any department or agency of the United States with intent to defraud any department or agency of the United States or to deceive any officer, auditor, examiner or agent of any department or agency of the United States . . ." is guilty of an offense.

There is no longer any place for the specific enumeration made in Section 1006 of Title 18 of the United States Code under such a construction of the statute. It is, therefore, respectfully submitted that a false entry in a report is a crime under this statute only if the report was made to one of the institutions specifically enumerated, as follows:

(1) Reconstruction Finance Corporation,
(2) Federal Deposit Insurance Corporation,
(3) Home Owners' Loan Corporation,
(4) Farm Credit Administration,
(5) Federal Housing Administration,
(6) Federal Farm Mortgage Corporation,
(7) Federal Crop Insurance Corporation,
(8) Farmers' Home Corporation,
(9) Any Land bank,
(10) Intermediate Credit bank,
(11) Bank for cooperatives,
(12) Any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States.

The Court's attention is invited to *Section 1014 of Title 18, of the United States Code,* which makes it a crime to make any false statement or report for the purposes of influencing in any way the action of . . . . a Federal Home Loan Bank, the *Federal Home Loan Bank Board,* the Home Owners' Loan Corporation, a Federal Savings and Loan Association . . .

It is significant that *Section 1467(c) of Title 12 of the United States Code* which was repealed when Section 1006 of Title 18 of the United States Code was enacted, makes any false entry in any book, report or statement of or to the (1) *Board,* or (2) the Home Owners' Loan Corporation, or (3) an association, a crime and fails to further enumerate any other agency or department of the United States, and that the language of this section was carried over into Section 1006 of Title 18 of the United States Code by *omitting* the "Board."

Count 24 of the indictment charges the defendant with a violation of Section 1006 of Title 18 of the United States Code and specifically with making a false entry in a report to the *Federal Home Loan Bank Board.* The Court's instruction stating the elements of the offense charged in Count No. 24 states in part as follows:

> "That while so employed, he did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board." [Tr. p. 455, lines 1-3.]

It is respectfully submitted that the instruction as well as the indictment fails to state facts which Section 1006 of Title 18 of the United States Code makes an offense. In that section, it fails to specifically enumerate the "Federal Home Loan Bank Board," as one of the agencies to which such a report may be made.

While a construction and interpretation of a criminal statute is based on two propositions, namely (1) to give effect to the intention of the Legislature, and (2) to give the statute a narrow construction (one of the basic principles of the interpretation of criminal statutes), it is not permissible to *add* to the statute terms which cannot be found therein.

When Section 1006 of Title 18 of the United States Code was re-drafted to replace Section 1467(c) of Title 12 of the United States Code, which was promptly repealed on the date that Section 1006 of Title 18 became effective, the Legislature could have included the Federal Home Loan Bank Board as one of the institutions of or to whom a false entry in a report constituted a crime. The failure of the Legislature to list the Federal Home Loan Bank Board must, according to the rules of construction and interpretation of statutes, be assumed to be an intentional omission, for it is one of the rules of construction and interpretation of statutes that a specific enumeration of terms excludes just as specifically any omitted term.

Count 24 of the indictment charges the making of a false entry in the report to the *Federal Home Loan Bank Board,* in an affidavit by defendant on March 22, 1949. It is respectfully submitted that on said date no Federal Home Loan Bank Board was then in existence.

The Federal Home Loan Bank Board was created under the Federal Home Loan Bank Act and particularly Section 1437 of Title 12 of the United States Code which reads, in part, as follows:

> "For the purposes of this chapter, there shall be a Board to be known as the 'Federal Home Loan Bank

Board' which shall consist of five citizens of the United States appointed by the President of the United States by and with advice and consent of the Senate. . . ."

Executive Order No. 9070, effective date February 24, 1942, as reported in Title 50 of the United States Code, App. Sec. 601, War Powers Act, states in part, as follows:

"1. The following agencies, functions, duties and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator: . . .

(b) All functions, powers and duties of the Federal Home Loan Bank Board and of its members."

Section 8 of the same Executive Order reads in part as follows:

"The following personnel are not transferred hereunder . . .

(2) the members of the Federal Home Loan Bank Board other than the chairman . . . The offices of the foregoing personnel excepted from transfer by this paragraph are hereby *vacated* for the duration of this order; Provided, That the offices of the members of the Federal Home Loan Bank Board shall not be vacated until sixty days from the date of this order."

Section 1462 of Title 12 of the United States Code was amended by Reorganization Plan No. 3 of 1947, ef-

fective date July 27, 1947, 12 F. R. 4981, 61 Stat. 954. set out at length in Title 5 of U. S. C. A. Sec. 133-y-16, p. 112, as follows:

"Section 1462. Definitions.

(a) The term 'board' means the *Home Loan Bank Board.*"

Section 1 of Reorganization Plan No. 3, *supra*, reads in part as follows:

"Section 1. Housing and Home Finance Agencies. The Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, *the functions of the Federal Home Loan Bank Board* and the other functions transferred by this plan are consolidated, subject to the provisions of sec. (2) and (5) inclusive hereof, into the agency which shall be known as the Housing and Home Finance Agency. There shall be in said agency, constituent agencies which shall be known as the *Home Loan Bank Board,* the Federal Housing Administration, and the Public Housing Administration.

Section 2. *Home Loan Bank Board.*

(a) The *Home Loan Bank Board* shall consist of three persons appointed by the President by and with the advice and consent of the Senate . . .

(c) Except as otherwise provided in subsection (b) of this section, there are transferred to the *Home Loan Bank Board,* the functions (1) of the *Federal Home Loan Bank Board* . . ."

It is therefore, respectfully submitted that Section 1006 of Title 18 of the United States Code not only fails to mention any report of the *Federal* Home Loan Bank Board, but the *Federal* Home Loan Bank Board was finally abolished in 1947 and the Home Loan Bank Board with different functions and a different organization was created.

For the foregoing reasons, a "false entry" in a report to the *Federal* Home Loan Bank Board cannot be a crime, and the indictment fails to state an offense against the United States.

II.

The Court Erred in Admitting Evidence During the Trial Over the Objection by Defendant in That the Court Admitted in Evidence Government's Exhibit 24-B, the Purported Affidavit of President H. A. Howard, Without Any Foundation Having Been Laid for Its Admissibility.

The testimony in connection with the admission in evidence of Government's Exhibit 24-B is reported at page 254, line 17 *et seq.,* of the Transcript as follows:

> "Q. Mr. Noon, do you have in your possession report of the Federal Savings and Loan Associations examiner pertaining to the Broadway Federal Savings and Loan Association dated on or about March 22, 1949? A. I have a certificate of the examiner in charge and the affidavit of the president or secretary on the same sheet.
>
> Q. For the same date March 22, 1949? A. The affidavit is March 22, 1949.
>
> Q. Will you produce it, please? A. (Producing document referred to.)

Mr. Danielson: I ask that this document be marked Government's exhibit next in order under Count 24, your Honor.

The Court: It may be received.

The Clerk: 24-B for identification?

The Court: No, it may be received in evidence.

Mr. Jefferson: I object to it, that there is an insufficient foundation laid for it, no relevancy at all has been shown relative to the document now being offered.

The Court: Overruled.

Mr. Rose: And it does not appear that this is a part of the Home Loan Bank Board's report. It appears to be just one sheet.

The Court: Overruled.

The Clerk: 24-B in evidence, your Honor?

The Court: 24-B in evidence.

(The document referred to was marked Government's Exhibit No. 24-B and received in evidence.)"

The foundation questions to admit a business record into evidence are clearly stated by the wording of *Section 1732 of Title 28 of the United States Code*, relating to "Records Made in Regular Course of Business" which reads in part, as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event *if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at*

the time of such act, transaction, occurrence, or event or within a reasonable time thereafter . . ." (Emphasis added.)

It is respectfully submitted that no foundation whatsoever for the admission of this exhibit was laid which would conform to the requirements of Section 1732 of Title 18 of the United States Code.

Apparently the government felt that the foundation was insufficient, because *after* the admission in evidence of this document, the next question by Mr. Danielson is as follows:

"Q. And is that certificate a part of the official records of your office? A. It is.

Q. No further questions from this witness on direct examination, your Honor." [Tr. p. 255, lines 19 to 23.]

It is respectfully submitted that this attempt to cure the error in the admission of this document, which is the basis for the accusation in Count 24 of the indictment, must of necessity fail, mainly for two reasons: (1) that it is insufficient as a basic foundation question under Section 1732 of Title 18, of the United States Code, because it is assuming that that certificate was a part of the "official records" of a governmental agency and there is absolutely no testimony that it was "the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter." Nor was there any testimony that the record was received by any government agency in the regular course of business, but to

the contrary, there was uncontested and uncontradicted testimony by defendant Howard that it was *not* delivered to any government agency and that he does not know how it came to be attached to any report, nor was it admitted as part of any report to any government agency; (2) The witness was not asked whether by "office" he meant "Federal Home Loan Bank" or "Federal Home Loan Bank Board."

Government's Exhibit 24-B itself does not indicate that the "Certificate of the examiner in charge" or the "Affidavit of president or secretary" is directed to any government agency, nor does Mr. Noon's testimony indicate that it was ever received by any government agency.

It is therefore respectfully submitted that it was prejudicial error to permit this document to be admitted in evidence over the objections of both counsel on the ground that first: an insufficient foundation had been laid for its admission; second: that it had not been shown that this document relates to any of the issues in this action, and third: that it did not appear to be any report or part of any report to the Home Loan Bank Board. The Court charged the jury in the language of the indictment on Count 24 of making a false entry "in a report to the Federal Home Loan Bank Board in that his affidavit, as president of said association, attached to the report of examination of said association, as of the close of business March 8, 1949, alleged that the signatures appearing on all assets recorded on the association's books were genuine, when in truth, there was then recorded on the rec-

ords of the association, a note bearing the signature 'Vashti Peake' which signature was false and forged as defendant well knew." [Tr. p. 451, lines 5-13.]

The questions asked the witness do not have the slightest tendency to identify Government Exhibit 24-B as being the affidavit referred to in the charge of the Court.

There is no mention made elsewhere in Mr. Noon's testimony or in the testimony of any other person, (1) *that there ever was a report of examination of said association as of the close of business March 8, 1949,* to which the affidavit was purportedly attached; (2) that there ever was a report to the Federal Home Loan Bank Board regardless of the date of such report to which any affidavit by this defendant was attached; (3) that any such affidavit was ever at any time delivered to any government branch or agency; and (4) there was no evidence of any act, conduct or statement or any other circumstance from which a jury could have concluded that Herbert A. Howard had an intent to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board at any time. In view of the fact that the charge of violation of Section 1006 of Title 18 of the United States Code as stated must stand or fall with the admission in evidence not of any affidavit of Mr. Howard, but of *the* affidavit referred to in the charge of the Court, reported at Transcript, page 450, line 25, to page 451, line 13, on which the jury presumably based its verdict, it is respectfully submitted that the admission in evidence of Government's Exhibit 24-B over the objections of defendant, is prejudicial error requiring the reversal of conviction on Count 24.

III.

The Court Erred in Failing to Give Certain Requested Instructions to the Jury and Particularly Defendant's Instruction No. 3 [Tr. p. 66] and Defendant's Instruction No. 62 [Tr. p. 72, line 22, to p. 73, line 8, Excepted to at Tr. p. 489, lines 6-12].

Defendant's requested instruction No. 3 reported at Transcript page 66, lines 17 to 20, reads as follows:

> "The law admonishes you to view with caution the testimony of any witness which testifies to an oral admission of the defendant or an oral confession by him."

This instruction follows the language of instruction No. 29-D of *California Jury Instructions, Criminal,* prepared under the direction of the Superior Court of Los Angeles County, California, with the cooperation of the Attorney General of California. This instruction was requested by the defendant in view of the fact that the *only* evidence linking this defendant with the signature of Vashti Peake on the Deed of Trust in evidence as Government's Exhibit 24-B, came from Mildred P. Wilson, a former employee of the Broadway Federal Savings and Loan Association and an officer thereof, who had been discharged by the defendant because of her inability to cooperate with the other employees of the association, after her sister Alma P. Moore had been discharged because of continued drunkenness on the job, and her other sister Vashti Peake had resigned from her position with defendant in view of the discharge of her other two sisters, and because there was uncontradicted and uncontested testimony on the part of defendant that the three sisters had agreed to acquire this property, and further

on the ground that the property stood purportedly in the name of Vashti Peake, *one* of the sisters, that the name of Vashti Peake was forged by *another* sister, Alma P. Moore, and acknowledged by Mildred P. Wilson, the *third* sister, as a Notary Public, *knowing that the signature of Vashti Peake was not the signature of her sister.* Defendant felt that the requested cautionary instruction was necessary, and that instruction was requested in lieu of an instruction cautioning the jury not to convict Howard on the uncorroborated testimony of an accomplice, because it did not appear that, under the law, Mildred P. Wilson could be named an "accomplice." Specifically, the testimony of Mildred P. Wilson which, in the opinion of defendant, required the giving of this cautionary instruction, is reported at Transcript, page 339, line 4, *et seq.,* as follows:

"By Mr. Danielson:

Q. Did you ever have any conversation with this defendant Mr. Howard relative to that signature? A. Yes.

Mr. Rose: That is objected to as being immaterial.

The Court: Overruled.

By Mr. Danielson:

Q. When did you have that conversation? A. When I was given this to be notarized.

Q. Where? A. In the association of the Broadway Federal Savings and Loan.

Q. What was said? A. Well—

Mr. Rose: That is objected to as being immaterial.

The Court: Overruled.

By Mr. Danielson:

Q. What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize this signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn't sign that.

Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association."

The testimony reported above is the only testimony in this case that Mr. Howard knew that the signature on the *deed of trust* which is part of Government Exhibit 24-A is false and there is no testimony at all in the record that he knew or had any reason to know that the signature of Vashti Peake on the *note* which is part of Government's Exhibit 24-A was false. It is respectfully submitted that in effect the testimony reported above, at best, shows that *the witness* Mildred P. Wilson *knew* that "Vashti didn't sign that." It is respectfully submitted that the answer by Mrs. Wilson: "I asked him how could I notarize it *because I knew Vashti didn't sign that*" is sufficient as a matter of law to interject a reasonable doubt into this case that *defendant* knew that the signature was false.

It is stated in *Gold v. United States* (C. C. A. 3rd), 102 F. 2d 350 at page 351, citing from Corpus Juris Secundum:

> " 'Where a timely request is made for instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the

case, it is the duty of the court to give them unless covered by other instructions given, or by the general charge, and non-compliance with this duty will necessitate a reversal where it can be said that appellant was prejudiced.' 5 C. J. S., App. p. 1155, Sec. 1774(a); Itow v. United States, 9 Cir., 223 Fed. 25; Hendry v. United States, 6 Cir., 223 Fed. 5; Feeder v. United States, 2 Cir., 257 Fed. 694, A. L. R. 370; Caufman v. United States, 3 Cir., 282 Fed. 776; Cohen v. United States, 3 Cir., 282 Fed. 871; Cooper v. United States, 8 Cir., 9 Fed. 2d 216; Sunderland v. United States, 8 Cir., 19 Fed. 2d 202; Nanfito v. United States, 8 Cir., 20 Fed. 2d 376; Link v. United States, 10 Cir., 30 Fed. 2d 342; Little v. United States, 10 Cir., 73 Fed. 2d 861, 96 A. L. R. 889; Rosser v. United States, 75 Fed. 2d 498."

In *People v. Cornett* (1948), 33 Cal. 2d 33, the Court states, at page 39:

"The trial court erred in failing to give an instruction that the jury should have viewed with caution the oral admissions of defendant. Section 2061(4) of the Code of Civil Procedure provides that the jury 'is to be instructed on all proper occasions; that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.' It is clear that in view of the foregoing code section the trial court should have given such a cautionary instruction. (People v. Koenig, 29 Cal. 2d 87, 94 (173 P. 2d 1); see People v. Thomas, 25 Cal. 2d 880, 891 (156 P. 2d 7)."

To the same effect:

People v. Todd, 91 Cal. App. 2d 669.

For the foregoing reasons and in accordance with the above citations, it is respectfully submitted that the failure to give defendant's requested cautionary instruction, was prejudicial error.

Defendant's requested instruction No. 62 [Tr. p. 72, line 22, to p. 73, line 8] reads as follows:

> "In connection with Count No. 24 charging the defendant with 'false entry', you are instructed that one of the necessary elements of the crime is the delivery of the affidavit to the Home Loan Bank Board.
>
> If you find that the affidavit was signed by Mr. Howard but was not delivered by him to the Home Loan Bank Board, or if delivered, that such delivery was not authorized by him, you are instructed that the defendant is not guilty of the charge involved in that count and you must acquit him."

Defendant excepted to the refusal to give defendant's Instruction No. 62 as follows:

> "Defendant excepts to the refusal to give defendant's instruction No. 62 on the ground that that was the only instruction which stated that delivery of the affidavit to the Home Loan Bank Board was one of the necessary elements of the crime of false entry. Unless there was a report made to the Home Loan Bank Board, there could not be a crime of false entry." [Tr. p. 489, lines 6 to 13.]

One of the chief issues involved in this count was the question of delivery of the purported affidavit in evidence as Government's Exhibit 24-B which the government claims was an affidavit attached to a report of examination of the Boardway Federal Savings and Loan Association of Los Angeles as at the close of business March 8, 1949. The only witness who could have testified to such delivery, namely, Orville M. Manley, who allegedly subscribed and swore to the affidavit, was not called by the government as a witness. There was no evidence at all of delivery, but there was positive, uncontradicted and uncontested testimony by defendant H. A. Howard that this affidavit was not delivered to any government agency by him or by any other person as far as he knew. [Tr. p. 403, line 10, to p. 404, line 19.]

The witness Mr. Noon, who brought Government's Exhibit 24-B into court, stated *that he did not know how that page came to be in the hands of any government agency* [Tr. p. 269, lines 8 to 11], *nor did he know under what circumstances the signature of H. A. Howard came to be on that piece of paper.* [Tr. p. 269, lines 12 to 15.]

It is respectfully submitted that no other instruction was given which covered the question of delivery, and in accordance with the authorities cited in connection with appellant's specifications of error concerning defendant's requested instruction No. 3, failure to give this instruction resulted in prejudicial error to the defendant.

IV.

The Court Erred in Giving Certain Instructions to the Jury to Which Appellant Duly Excepted, as Follows: (a) the Court's Instructions Reported at Transcript, Page 465, Lines 17 to 22, and Page 459, Lines 12 to 19, Excepted to at Page 486, Lines 8 to 18, of Reporter's Transcript, and (b) the Court's Instruction Reported at Page 459, Lines 20 to 26, Excepted to at Page 485, Lines 12 to 23, Reporter's Transcript.

The Court instructed the jury as reported at Transcript, page 465, lines 7 *et seq.* as follows:

> "A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect *until overcome or outweighed by evidence to the contrary;* but unless so outweighed the jury are bound to find in accordance with the presumption." (Emphasis added.)

The Court further instructed the jury as stated at page 459, lines 12 *et seq.* of the transcript as follows:

> "The law presumes the defendant to be innocent of any crime. This presumption of innocence continues throughout the trial, and has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant, unless the presumption *is outweighed by evidence satisfying the jury beyond a reasonable doubt of the defendant's guilt.*" (Emphasis added.)

The defendant excepted to the first quoted instruction on the ground that:

> "It is stated that a presumption continues and is good until overcome or outweighed by evidence to the contrary. It is a general rule, accepted by the federal court, that presumption of innocence is not outweighed by other evidence, but is only outweighed by evidence which gives the jury a conclusion that the evidence outweighs the presumption beyond a reasonable doubt and to a moral certainty. For that reason the defendant objects to that instruction. It is not sufficient to counteract that by any evidence other than of that weight." [Tr. p. 486, lines 10 to 18.]

It is respectfully submitted that the instruction, reported at page 459, lines 12 *et seq.* as quoted above, correctly states the law, namely, that the presumption of innocence is sufficient to acquit a defendant unless the presumption is outweighed by evidence satisfying the jury beyond reasonable doubt of the defendant's guilt, but it is not overcome or outweighed merely by "evidence to the contrary."

The jury was confronted with two conflicting instructions, one which obviously is not the law, and the other which correctly states the law. It is respectfully submitted that this conflict resulted in a prejudicial error to the defendant in that the jury might have applied the definition of presumption applicable in *civil cases only,* although the evidence on which they might have acted was not sufficient to outweigh the presumption beyond a reasonable doubt or to a moral certainty.

The Court defines "proof beyond reasonable doubt" in its charge to the jury as follows:

> "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your affairs." [Tr. p. 439, lines 23 to 25.]

The Court charged the jury further on the question of reasonable doubt as follows:

> "Reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty, that defendant is guilty as charged." [Tr. p. 460, lines 10 to 14.]

Defendant excepted to the first quoted instruction, as reported at page 485, line 12 of the transcript, as follows:

> "Defendant excepts to Government's No. 3 entitled 'Presumption of Innocence, Burden of Proof, Reasonable Doubt.' It sets up two standards which are irreconcilable, namely, one is that proof of a crime beyond a reasonable doubt is established by evidence which they would be willing to act upon in the most important of their own affairs. On the other hand, it is said that reasonable doubt exists only when they are satisfied to a moral certainty that the defendant is not guilty of the charge. That sets up two standards which are irreconcilable with each other and for that reason defendant excepts."

It is a well known fact that persons might act in an event "most important to their own affairs" on facts which are doubtful and conjectural and that they are willing to take their chances and risks depending upon the prospective profits and results. Such a statement is far removed from the standards applied in a criminal case, namely, a conviction of the jury to a moral certainty that defendant is guilty of the charge. The feeling of "moral certainty" cannot be compared with any other feeling which might be applied by the juror in his business or other place. The statement needs no explanation and the average person will well be able to understand and evaluate his duty in applying it.

The instruction of the Court, related at page 459, lines 20 to 26, of the transcript, is in irreconcilable conflict with the standards embodied in the instruction at page 460. lines 10 to 13, of the transcript, and for that reason, it is respectfully submitted that the Court committed prejudicial error in giving the first mentioned instruction.

V.

The Court Erred in Denying Defendant's Motion to Dismiss the Indictment and for Judgment of Acquittal on the Following Grounds: That the Evidence Is Not Sufficient to Sustain a Conviction on Count 24 of the Indictment in That There Is a Complete Lack of Evidence in the Record of This Case to Establish: (a) That Defendant H. A. Howard, or Any Other Person, Made a Report to the Federal Home Loan Bank Board on or About March 22, 1949, (b) That There Is in Existence Any Report of Examination of the Broadway Federal Savings and Loan Association of Los Angeles as at the Close of Business March 8, 1949, (c) Any Intent to Defraud or Deceive the Federal Home Loan Bank Board, (d) That There Was Any Federal Home Loan Bank Board Then in Existence, (e) That Defendant Knew or Had Any Reason to Know That the Signature of Vashti Peake on the Promisory Note Was False or Forged.

The testimony of the witness Frank C. Noon has been recited repeatedly for other reasons. Nowhere in the record is there any evidence that defendant Howard or any other person made a report in affidavit form to the Federal Home Loan Bank Board on or about March 22, 1949. The evidence conclusively shows that Government's Exhibit 24-B which purports to be an affidavit sworn and subscribed to by Orville M. Manley, examiner, was never sworn and subscribed to before anyone. The examiner has not been called as a witness by the government, and defendant's testimony stands uncontradicted, uncontested and unimpeached to that effect. The indictment charges that the affidavit in question was attached to a report of examination of the Broadway Federal Savings

and Loan Association of Los Angeles as at the close of business March 8, 1949. There is no evidence whatsoever of any report as of that date and as a matter of fact, that date was never mentioned by any witness in this action. While intent to deceive or defraud may be proved or inferred from acts, circumstances or statements, there was no evidence in this case on which a jury could have found that there was any intent by this defendant to defraud or deceive anyone. It has been set forth at length that the Federal Home Loan Bank Board to whom a report was purportedly made, was abolished by Reorganization Plan No. 3 in 1947, and that no Federal Home Loan Bank Board was in existence on March 22, 1949, to which such report might have been made.

The indictment charges the defendant Howard with making or causing to be made,

> "a false entry in a report to the Federal Home Loan Bank Board, namely, an affidavit of the president of said association, attached to a report of examination of said association as at the close of business of March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association's books are in full force and effect and that the signatures appearing thereon are genuine, whereas in truth and in fact, there were recorded on the records of said association the following *notes* bearing the signature of one Colleen B. Williams and one Vashi Peake:
>
> Loan No. 267—Colleen B. Williams
> Loan No. 274—Vashti Peake,
>
> and said signatures were false and forged as the defendant then knew." [Tr. p. 16, lines 3 to 10.]

The Court charged the jury as follows:

"Count 24 of the indictment charges that on or about March 22, 1949, in Los Angeles County, California, the defendant, Herbert A. Howard, as president of the Broadway Federal Savings and Loan Association of Los Angeles, with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board in that his affidavit, as president of said association, attached to the report of examination of said association as of close of business March 8, 1949, alleged that the signatures appearing on all assets recorded on the association's books were genuine, while in truth there were then recorded on the records of the association a *note* bearing the signature 'Vashti Peake' which signature was false and forged as the defendant well knew." [Tr. p. 450, line 25, to p. 451, line 13.]

It is respectfully submitted that *there is not one word of evidence in the transcript that the defendant knew that the signature on the note referred to in the indictment and in the charge of the court was either false or forged.* The only evidence relates to the *deed of trust* attached to Government's Exhibit 24-A and does not relate to the *note.* Mildred P. Wilson, one of the three sisters, testified as follows:

"By Mr. Danielson:

Q. What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize the signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn't sign that.

> Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association." [Tr. p. 339, line 20, to p. 340, line 2.]

All of the testimony relates to the *notarization of the deed of trust and not to the note.* But even the testimony above related is conjectural, ambiguous and immaterial. Mrs. Wilson particularly states:

> "I asked him, how could I notarize it *because I knew Vishta didn't sign that.*"

It does not appear whether she knew that Vishta didn't sign that or whether she told Howard that Vishta didn't sign it. Her next answer "He said that I take full responsibility for anything that happens at this association," is immaterial and does not assist one way or the other in determining any issue in this case because apparently Howard did not state that *he* was taking full responsibility but he stated that *she* was taking full responsibility for anything that happened at the association.

In any event all of the above testimony refers to the *deed of trust* and is not an issue in this case. Defendant is not charged in the indictment, nor did the court charge the jury, that defendant knew that the signature on the deed of trust was false or forged, but the indictment charges defendant and the court charged the jury that the signature on the *note* was false and forged as the defendant then knew, and there is not one speck of evidence anywhere in the record of this action indicating such knowledge by this defendant.

Since the jury found defendant guilty of making a false entry in the report to the Federal Home Loan Bank

Board, that defendant knew the entry to be false and forged, and that defendant made such entry with intent to deceive and defraud the Federal Home Loan Bank Board, the jury must have found those facts from the above evidence, because no other evidence was available to them.

The following fact was established by Mr. Noon's testimony, namely: that he received the Government's Exhibit 24-B from a "chief supervisor" in Washington. Noon admitted that he did not know under what circumstances the signature of Mr. Howard was affixed to the affidavit, nor did he know how the report came to be in the hands of a government branch. The evidence, therefore, shows:

Fact: Noon received Government's Exhibit 24-B from a "Chief Supervisor" in Washington.

First Inference to be drawn by Jury: That Noon received the Government's Exhibit 24-B from the Home Loan Bank Board and that it was a part of a report made to the Home Loan Bank Board relating to the business of Broadway Federal Savings and Loan Association of Los Angeles as of the close of business March 8, 1949 and that said report was made by an examiner attached to the Home Loan Bank Board or under its jurisdiction whose name was Orville M. Manley.

Second Inference to be drawn by the Jury: That the "Affidavit of president or secretary" which was signed by Howard was subscribed and sworn to before Orville M. Manley, examiner, on March 22, 1949, and that H. A. Howard handed that affidavit to Orville M. Manley, examiner, for the purpose of having it attached to a report to the Home Loan Bank Board.

Third Inference to be drawn by Jury, based on the First and Second Inferences: That at the time Mr. Howard knew that the signature on a note in evidence as Government's Exhibit 24-A was false and forged, and that he signed the affidavit in evidence as Government's Exhibit 24-B with intent to deceive and defraud the Home Loan Bank Board.

It is settled law that a defendant cannot be convicted if a necessary element to his conviction is supplied by an inference upon an inference upon an inference based upon a fact. Such evidence is mere speculation and would not be permissive even in a civil case as proof of any fact.

Judge Yankwich cited numerous authorities and states in *United States v. Cole*, 90 Fed. Supp. 147, at page 156:

> "The Courts, in interpreting criminal statutes which require knowledge as an essential element of criminality, have warned us not to draw an inference on an inference."

It is stated in 20 *Am. Jur.* 168, Section 164:

> "An inference may not be based upon another inference or upon a fact, the existence of which, itself, rests upon an inference." Citing *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707, and others.

It is stated in 25 A. L. R. 173:

> "The rule that an inference cannot be based upon an inference to establish a fact necessary to be proven in the trial of a case has been said to apply to every sort of a case where a definite and ultimate fact must be found as a basis of recovery. In general, no distinction has been made between civil and criminal cases, as regards the rule that an inference cannot be based upon another inference, the rule apparently

being regarded as applicable in both classes of cases. In a criminal case in a Court of Appeals of Ohio, the Court, in reversing the judgment, said that the conviction could only be had from inference based upon inference which was not sufficient in a civil action to sustain a judgment, and much less would it be sufficient to sustain a conviction on a criminal charge, wherein the State must prove the charge beyond a reasonable doubt."

In the instant case, it is not only a question of an inference based upon an inference based upon a fact, but in addition to that the record shows the unimpeached, clear and uncontradicted testimony by Mr. Howard that the affidavit was *not* delivered and *not* made a part of any report to the Federal Home Loan Bank Board negativing in addition, any intent to deceive the Federal Home Loan Bank Board. It is the general rule as stated by the United States Supreme Court and in the text books on evidence, that *an inference is dispelled by positive and otherwise uncontradicted testimony to the contrary.*

In Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, the United States Supreme Court affirmed the judgment for a directed verdict in a civil case of the District Court, the Court stating at page 340, citing numerous supporting decisions:

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought

to be inferred did not exist. This conclusion results from a consolidation of many decisions, of which the following are examples (citing twelve cases). A rebuttable inference of fact, as said by the court in the Wabash R. Company case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the Court in George v. Missouri P. R. Co. *supra*, 'It is well settled that where plaintiffs' case is based on an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inference'."

The Supreme Court then continues its argument along the same lines, and it is respectfully submitted that in view of this holding, an inference of the existence of a particular fact from other proven facts is dispelled in the face of positive and otherwise uncontradicted testimony of an unimpeached witness, from which testimony it affirmatively appears that the facts sought to be inferred did not exist.

As in the last cited case, Mr. Howard, in the case at bar, affirmatively testified that the facts inferred did not in fact exist, namely, that he did not attach the affidavit to any report nor did he authorize any person to attach the affidavit to any report, and for that reason, an intent to deceive the Federal Home Loan Bank Board is of necessity negatived.

It is stated by *McBaine* in his *Evidence Manual* at page 666, Section 426:

"Although proof of specified facts, standing alone, warrants an inference of an ultimate or operative fact, involved in a law suit, if, however, there is evidence of the non-existence of the latter fact, which

> is uncontradicted and not improbable, uncertain or vague, the inference may not be drawn by the triers of the fact, although the evidence is produced by the litigant disputing the ultimate fact asserted." (Citing *Engstrom v. Auburn Auto Sales Corp.,* 11 Cal. 2d 64, 77 P. 2d 1059.)

Again at page 668 of the last cited text on evidence, McBaine states:

> "An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side."

It is respectfully submitted that the factual situations referred to by the United States Supreme Court, by McBaine and by numerous cases cited in these cited quotations, coincide with the situation encountered in the case at bar, where the Jury has to draw a minimum of three inferences, one based upon the other to arrive at the conclusion that a necessary element of the offense charged in Count No. 24 of the indictment against Mr. Howard is proven, in the face of the clear and concise evidence to the contrary by the defendant.

If we consider "the fact" on which these inferences might have been based by the Jury, namely, the fact that Mr. Noon testified that he received the affidavit from a Chief Supervisor in Washington, and *that he had no personal knowledge how it got there,* it becomes clear that the foundation on which Government's Exhibit

24-B was admitted into evidence is as shaky, speculative and unfounded as the inferences themselves.

The answer to this argument on Count 24 of the indictment against Herbert A. Howard hinges on the fact that the Government failed to produce Mr. Manley, the person who purportedly notarized the signature of Mr. Howard on Government's Exhbit 24-B, and who purportedly audited the association's records at the time charged in the indictment, and who purportedly prepared a report to the Federal Home Loan Bank Board to which it is claimed, Government's Exhibit 24-B was attached.

On this point, it is clearly stated in *Wesson v. United States* (C. C. A. 8th, 1949), 172 F. 2d 936:

> "The failure of the Government, under the circumstances disclosed, to call these witnesses, justifies, if it does not compel, the inference that their testimony would have been against the government. Aetna Casualty & Surety Co. v. Reliable Auto Tire Co., 8 Cir., 58 F. 2d 100; Goldie v. Cox, 8 Cir., 130 F. 2d 695; Donnelly Garment Co. v. Dubinsky, 8 Cir., 154 F. 2d 38; Futrell v. Arkansas-Missouri Power Corporation, 8 Cir., 104 F. 2d 752.
>
> *Defendant's testimony fully explains the only discrepancies that appeared in any of his prescriptions covering the entire time in controversy.* The cases cited to support the government's theory here were cases in which the purchase and possession of extraordinary quantities of narcotics were unexplained. Certainly, the proven circumstances were as consistent with innocence as they were with guilt, and *in-*

ference may not be drawn from inference. As said by us in Nations v. United States, 8 Cir., 52 F. 2d 97, 105, in an opinion by Judge Stone: 'Such double inferences are too remote to constitute evidence. As said by the Supreme Court in United States v. Ross, 92 U. S. 281, 283, 23 L. Ed. 707; 'They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain.'

The circumstances as they stand out in the record are consistent with the direct, uncontradicted and unimpeached testimony of the defendant and his witness. Mere suspicion raised by the circumstances proved would not sustain a conviction, especially when such suspicion is removed by uncontradicted evidence.

It follows that the judgment must be reversed and the cause remanded to the trial court with directions to enter a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., relative to motions for acquittal." (Emphasis added.)

It is respectfully submitted that based upon the foregoing authorities and the reasons stated therewith, and upon the complete lack of evidence concerning every part or portion of the charge on Count 24 of the indictment, the Court erred in denying Defendant's motion for judgment of acquittal.

Conclusion.

For the foregoing reasons, and in accordance with the above-cited authorities, it is respectfully submitted that the judgment of conviction should be reversed and the case remanded to the trial court with instructions to dismiss the Indictment as to Count 24 and to enter a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure as to both Counts 22 and 24 of the Indictment.

Respectfully submitted,

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